No. 332.

Br. of Hamilton for Appellees

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Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 332.

THE PUT-IN-BAY WATER WORKS, LIGHT AND RAILWAY COMPANY, APPELLANT,

vs.

CHARLES W. RYAN AND J. WILLIAM RYAN, SURVIVING PARTNERS OF THE LATE PARTNERSHIP OF ARBUCKLE, RYAN & CO., ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF ON BEHALF OF APPELLEES.

J. K. HAMILTON,
Counsel for Appellees.

SUPREME COURT OF THE UNITED STATES.

THE PUT-IN-BAY WATER WORKS, LIGHT and RAILWAY COMPANY, *Appellant*,

vs.

CHARLES W. RYAN and J. WILLIAM RYAN, surviving partners of the late partnership of ARBUCKLE, RYAN & COMPANY, ET AL. *Appellees.*

On Appeal.

No. 332.

Brief for Appellees.

This controversy grows out of a project for building two miles of electric railway, together with a lighting and power plant, on Put-in-Bay Island, in Lake Erie, Ohio.

No stock of the railroad company was ever subscribed and paid for as required by Section 3243 of the Revised Statutes of Ohio, which provides that, "ten per cent on each share of the capital stock shall be paid for at the time of making the subscription, and the residue thereof shall be paid for in such installments as may be required by the directors." See Printed Record, pp. 5 and 21.

One J. K. Tillotson had made a contract by which he was to build the railroad for the stock and bonds, and he had in

turn contracted with The Industrial Mining and Guaranty Company and John H. Carrothers, by which they were to sell the stock and bonds to raise money for the railroad construction. Tillotson in his Cross Bill asserted that they had failed to carry out their contract and that they never paid in more than $15,000.00 on their agreement. The record shows, as we assert, that all the rest of the money put into the railroad was contributed by the contractors and laborers. The contractors set up their mechanics' liens in this case and the laborers' liens have been paid by the proceeds of the sale of the Receiver's Certificates, as will hereinafter be shown by the Record.

The case, after having been in the Courts below for eight years, is here at last solely on the question of jurisdiction, and this Court is asked to set aside, vacate and hold void every order, act, decree, cost and expense incurred during all these years to preserve and improve the railroad property, and to turn the same over to the merely nominal owners of the stock.

I appear for Charles W. Ryan and J. William Ryan, purchasers of the property, who are named in the petition for appeal, as surviving partners of Arbuckle, Ryan & Co., and for M. V. Barbour and Rowland Starr, partners as Barbour & Starr.

I wish to call the attention of the Court to the record as to the parties. Reference to the original bill of complaint (Printed Record 1-3) and to the final decree (Record 134-136) shows that in the Court below the partnership firm of Arbuckle, Ryan & Co. was made one of the parties defendant and that a portion of the final decree was in favor of the partnership as such. Nowhere in the Record in the Court below, nor in this Court, does it appear that said firm was ever dissolved, nor that Charles W. Ryan and J. William Ryan, either as individuals or surviving partners, have been made parties to the case except by the petition for appeal herein, nor has any

suggestion been made at any stage of the proceedings of the death of any individual member of the said firm. It is suggested that the proper parties are not before the Court.

CORRECTED STATEMENT OF FACTS.

The statement of the case as made in the Brief filed herein by the Appellant is, in the main, an accurate statement of the controversy, but in a few matters we desire to correct errors inadvertently appearing therein, and also to supplement such statement in a few respects.

On page six of Appellant's Brief it is stated that in the Answer filed by the Railway Company to the original Bill, denial was made that the value of the material furnished was $2787.04, but amounted in value to only about the sum of $700.00, and no more. We desire to call attention to the fact that this latter allegation was made on information and belief only. (Record 17.)

The statement is made on page nine of the Brief that the affidavit of Carrothers (Record 32-38) in support of the motion to dissolve the injunction stated that Tillotson was, on the 3rd of September, enjoined by an injunction issued by the Common Pleas Court of Ottawa County, Ohio, from further interfering with the Company's operation of said railway. This statement is not strictly correct. Reference to the affidavit (Record 37-38) shows that the statement therein reads as follows:

"Thereupon and to prevent the said Tillotson, his agents and servants, from such unlawful and forcible interference with the said Company's possession and operation of its property, the said Company obtained from the Common Pleas Court of Ottawa County, Ohio, a restraining order, a certified copy of which is hereto attached, marked Exhibit 'E.'"

The certified copy in question shows that such injunction was to take effect "upon the plaintiff giving an undertaking as provided by law in the sum of $5000.00 to the satisfaction of the Clerk of this Court."

The certificate of the Clerk also appears as a part of said Exhibit, but entirely fails to show, nor does the Record otherwise in any manner or form disclose, that said bond was ever given.

It is needless to say that there was no injunction unless the bond required as a prerequisite was given.

The statement is made on page ten of the Brief that no replications were filed by complainants or Tillotson to the Answers of Carrothers or the Railway Company.

We concede that none were filed by complainant, but Replications denying in toto the allegations of the Answers were filed by Tillotson on June 10th, 1893, both to the Answer of the Railroad Company and to that of Carrothers. These Replications do not seem to be brought into the Printed Record by Counsel for appellant.

On page eleven of the Brief it is stated that the judgment of the Circuit Court of Appeals reversed the judgment of the lower Court and commanded the dissolution of the injunction, because the evidence showed that the Court had no jurisdiction of the cause on account of lack of sufficient jurisdictional amount in complainant's claim, by which the jurisdiction had been invoked, and because of unlawful interference through these proceedings with certain proceedings in replevin and for injunction pending in the State Court.

Reference to the mandate (Record 52) will show that the order of the Court of Appeals was simply one of reversal and dissolution of the injunction, with the direction that the lower Court take further proceedings in conformity with the opinion of that Court.

In addition to the statement of the case as made by counsel for appelant, we desire to call attention to the following:

Arbuckle, Ryan & Company were made parties originally, but *not served with process* until after the Receiver of the Railway property had been appointed, given bond and taken possession of all the property.

They filed their Answer and Cross-Bill September 30th, 1892, asking relief, while the Railroad was in the possession of the Receiver. (Record 42.) Barbour & Starr, for whom with others this brief is filed, came in as intervenors February 18, 1893, the property then being in hands of the Receiver.

On September 26th, 1892, when the Railroad Company filed its Answer, its Answer was not due. The appearance day of the defendant was the first Monday in October, and the rule day for Answer was the first Monday in November, 1892. (Record 4.)

The Receiver took possession on the 10th day of September, 1892, and began immediately investigation of the condition of the property, finding that a number of cars were in Toledo waiting transportation to the Island, on which there were freight charges; that a car house was necessary to protect the cars; that the track needed repairs, &c. In short, that money was absolutely necessary to preserve the property of which he had been put in charge, he himself having already incurred a personal liability for $250.00 to this end. (Record 28.)

On this showing, on the 15th day of October, 1892, he was authorized by the Court to borrow $5000.00 for the preservation and protection of the property, and to issue Certificates therefor, which were made a lien on all the property of the Railroad Company in the hands of the Receiver, superior and prior to all other liens, except taxable costs and expenses of the action.

If the first Report of the Receiver had been carried into the Printed Record, it would disclose that these Certificates thus ordered were negotiated on or prior to October 28th, 1892, as on that day the Receiver charges himself with the proceeds thereof.

On the 29th of October, 1892, the Railway Company filed two motions; one to vacate the injunction allowed on Tillotson's Cross-Bill, and the other to discharge the Receiver. Each motion was based on the same grounds, viz: lack of notice of application, and an allegation that the averments of Tillotson's Cross-Bill were untrue. In neither of these motions was any attack made upon the Court's jurisdiction.

Carrothers's affidavit in support of the motions was filed October 29th, 1892, and the affidavit of Franklin S. Terry, on which ultimately the Circuit Court of Appeals acted, was not filed until the 12th day of November, 1892.

How early the attention of Judge Ricks, or of any other Judge, was called to these motions, does not appear from the Record, save that it appears that the motions aforesaid came on for hearing before Judge Ricks on the 22nd of December, 1892. On this hearing numerous affidavits were heard on both sides, and the judicial conclusion arrived at was that the evidence in support of the motions was insufficient, or was overbalanced by the evidence against the same. These motions were, therefore, both overruled; whereupon an appeal was taken to the Circuit Court of Appeals, which, for the first time, raised the question of jurisdiction. (Record 46.)

At the same date on which these motions were overruled Judge Ricks further authorized the Receiver to borrow an additional $5000.00, for which purpose he was given authority to issue Receiver's Certificates, which were likewise ordered to be established as a lien upon the property.

The facts concerning the appeal and the action of the Circuit Court of Appeals have been correctly stated in Appellant's Brief.

Not until after the mandate from the Circuit Court of Appeals came down do we hear of any action taken by the Railway Company invoking the action of the *Circuit Court* on the question of jurisdiction, although the question had apparently been submitted to the Circuit Court of Appeals.

The Circuit Court promptly dissolved the injunction in compliance with the mandate of the Circuit Court of Appeals, and, apparently, as soon as it was possible to take action upon the motion to dismiss, acted thereon by entering an order conditionally granting the same. (Record 74.)

The Railway Company, not caring to accept the action of the Court which it had invoked, and the summer season being on when the Road could be operated, the Court directed the Receiver to lease the Road for the season of 1893, and, in fact, as it afterwards appeared, leased the Road for operation each season until and including 1899, at the highest price that could be obtained therefor; and the Receiver accounted for the receipts thereof.

On two other occasions applications were made to the Court for orders to set aside the Receivership and to fix bond, by the giving of which the property might be released.

In each instance the Court complied with the request on certain conditions, but those invoking this action of the Court, refused to comply with the terms imposed.

The attitude of Arbuckle, Ryan & Company on these matters is evidenced,

1st. By the serious effort made by said partnership to require the Receiver's Certificates to be surrendered and the case dismissed. (Record 75.)

2nd. By their effort to be permitted to introduce evidence to controvert the allegations of the affidavit of Terry upon the question of jurisdiction of the Court. (Record 91.)

The property finally went to sale. From that sale was realized the sum of $16,501.00, which was distributed as follows: (Record 135-136.)

1—The costs in the case,

2—Receiver's Certificates,

3—Unpaid taxes on the property,

4—100-165ths of the balance to the intervening mechanics and material men as lien-holders,

5—The balance, being 65-165ths of what remained after the payments provided for in 1, 2 and 3 above, was left in the Registry of the Court for its further order. This amount is applicable solely upon the mortgage of Atlantic Trust Company, no other or superior right or lien being now asserted against the same. The amount thus remaining is nearly $2600.00.

We shall refer to this order of distribution further on in the Brief.

ARGUMENT.

I.

We claim that after the cause was remanded from the Circuit Court of Appeals for further proceedings in accordance with its opinion, further proceedings were had in the Circuit Court in accordance with that opinion and direction, and therefore the cause is not now properly before this Court for review.

The Circuit Court of Appeals on the appeal taken to it by The Industrial Mining and Guaranty Company might have dismissed the action had it considered this the proper order to enter in the case.

In re Tampa Suburban Railway Co., 168 U. S., 583.

Castner vs. Koffman, 178 U. S., 168-184.

Smith vs. Vulcan Iron Works, 165 U. S., 518.

U. S. vs. Jahn, 155 U. S., 109.
Robinson vs. Caldwell, 105 U. S., 359.

Instead of so doing, that Court rendered an opinion clearly indicating the right of the lower Court to require payment of those Receiver's Certificates, the proceeds of which had been used in preserving, or making betterments upon, the Railroad property. Furthermore, it did not reverse the order refusing to discharge the receiver, which was equivalent to affirmatively refusing said discharge, since the action of the Circuit Court was all before the Circuit Court of Appeals. Moreover, the Circuit Court of Appeals followed this opinion with a mandate requiring the lower Court to proceed in accordance with it. The lower Court thereafter strictly obeyed such mandate, proceeded no further upon the issues presented by the Bill and Tilbotson's Cross Bill and endeavored in every way to dismiss the case entirely upon payment of the items indicated in the opinion of the Circuit Court of Appeals.

That such procedure by Judge Severens was in accord with the views taken by the Circuit Court of Appeals in its previous decision, is clear from the fact that the Railway Company subsequenty brought a proceeding in Mandamus, in the latter Court, for the purpose of obtaining the definite construction by such Court of its former mandate, and an order upon Judge Severens forthwith to dismiss the case absolutely and without any condition annexed to pay any portion of the Receiver's certificates and expenses.

In this effort the Railway Company was unsuccessful and the Mandamus was denied.

In re, The Put-in-Bay Water Works, Light and Railway Co., 90 Federal Rep., 831.

We suggest to this Court that the opinion of the Circuit Court of Appeals has become the law of this case. The parties were before the Circuit Court of Appeals, the case was before them, and they had the power to decide, as the authorities

above cited show, not only the question of the injunction, but the question of the appointment of the Receiver and the question of jurisdiction. In any event, their mandate to the Circuit Court required that Court to proceed in accordance with their opinion. That opinion, fairly construed, means that the Circuit Court should dismiss the case, conditioned upon the payment of so much of the Receiver's certificates as went to the betterment and preservation of the road.

From such orders and decrees of the Circuit Court as were entered in accordance with that mandate, no appeal lies.

The Aspen Mining, &c., Co. vs. Billings, 150 U. S., 31.
Stump vs. Hornback, 109 Mo., 272.
Paland vs. Chicago, etc., Co., 44 La. Ann., 1003.
Vinard vs. Green, 4 Utah, 458.
Stewart vs. Salaman, 4 Otto, 434.

II.

Proceeding, however, to a consideration of the points mainly argued by appellants, we approach the discussion of two fundamental questions which are thereby presented for solution.

Had the Court below jurisdiction to impress the property with a lien for any part of the costs of the case, or the Receiver's Certificates, and order a sale for the payment of the same?

Regardless of the rightfulness of the Court's possession, did the fact of that possession confer a jurisdiction to adjudicate the claim of any intervenor and adjudge a sale to satisfy such claim?

Bearing in mind that the purchaser of property at judicial sale succeeds to the rights of all lien-holders in the case, an affirmative answer to either of the above questions will support the decree entered in this case and the orders appealed from.

As preliminary to the discussion of the first of the above questions it will be convenient to ascertain to what extent the Receiver's Certificates were valid.

WAS THE APPOINTMENT OF THE RECEIVER ABSOLUTELY VOID?

The claim of Appellant's Counsel is that the Receiver's appointment was absolutely void; that he was a trespasser; that his conduct was tortious; that he had no rights that anybody was bound to respect, and that no rights could be acquired by any one from or under him.

This argument is based upon the claim that the Court below was without jurisdiction of the main controversy and therefore without jurisdiction of any of its incidents.

This contention will not stand a critical examination of the facts of the case.

The objections presented by the argument of Counsel for Appellant, to the jurisdiction of the lower Court over the main controversy may be classed as follows:—

1. That the pendency of an action for replevin in a State Court prevented the Federal Court from taking jurisdiction;

2 That the pendency of certain injunction proceedings in, and the issuing of a writ of injunction from, a State Court in like manner prevented the Federal Court from taking jurisdiction;

3. That the amount involved was below the Court's jurisdiction;

4. That there was collusion between the original complainant and Tillotson, whereby a case was presented for the action of the Federal Court, which was, not in fact, cognizable by that Court.

These objections may again be re-classified as objections to the jurisdiction of the United States Court to determine,

1. The controversy presented upon the Cross Bill of Tillotson, and

2. The controversy presented by the original Bill of Complainant.

THE PENDENCY OF THE REPLEVIN CASE WAS NO BAR TO THE JURISDICTION OF THE UNITED STATES COURT.

The only proof of the existence or pendency of any replevin proceedings lies in the answer of Carrothers to the Cross Bill of Tillotson (Record 20), and the statements regarding the same matter contained in the affidavit of Carrothers. (Record 35).

These statements are in substance merely that the defendant Railway Company, through its President, secured possession of the personal property of said Company by means of a proceeding in replevin. Considerable stress is laid upon the pendency of this replevin proceeding, by Counsel for Appellant, who (page 25 of their Brief) say that the Cross Bill was filed to evade certain replevin proceedings then, and still, pending in the State Court, between the same parties, and involving the same controversy, and that these facts were never denied.

On the matter of denial, it is perhaps enough to say that there was no call for any denial, inasmuch as the averments of the Answer and Affidavit referred to, were to the effect that it was the *Company* that was in possession of the property and not that said property was in the possession of another tribunal; and, further, said averments further utterly failed to show where the replevin proceedings were instituted, whether they were still pending and whether, or not, the controversy hereby presented was, in fact, identical with that presented by the Cross Bill of Tillotson.

Again, the property taken possession of by the Receiver in this case never came into the custody of the Court of Common Pleas of Ottawa County, Ohio, by virtue of any writ of replevin, nor was that property in controversy in the Replevin proceedings.

The property taken possession of by the Receiver was the Railroad and property described in the original Bill (Record 2); that is, the Power House building, situate on lots 471, 472, 473, 474 and 475, in Victory Park Addition to Put-in-Bay Island, and the poles, ties, tracks and other structures of the Railway Company upon Put-in-Bay Island, including all the property of the defendant Company.

Mr. Carrothers never testified, and there is no other evidence to show that the Railroad, the tracks, ties, poles, and power house were replevied. Carrothers does say in his Answer to the Cross Bill of Tillotson that he obtained possession of the Railroad by virtue of the writ of Replevin, (p. 20 of Record). But in his affidavit his statement is that, as President, he did institute replevin proceedings to obtain possession of the personal property of the Company. (Record p. 35).

The absurd proposition seems to be now maintained that the electric railway, such as this was, and the power house, where the motive power for the Railway was generated, and the lots or real estate upon which it was situate, were all subject to a writ of replevin. I quote the contention of Appellant (page 36 of his Brief):

"By the service of the writ of replevin issued from the State Court, the property came into the custody and possession of that court for all purposes of jurisdiction in that case, and no other court had a right to interfere with that possession except a court having a direct supervisory control over the court issuing the writ, or some superior jurisdiction in the premises. The state court having placed the property in the possession of the officers of the Railway Company as against the claim of Tillotson, *by a writ of replevin*, the United States

Circuit Court in this case had no jurisdiction to issue an injunction or to appoint a Receiver by means of which the Company and its officers were prevented from using and operating the railway property, which the State Court had directed its officers to place in their hands."

Counsel certainly for the moment must have forgotten the law, supposed to be well known to every lawyer, when he asserts the above doctrine.

This railway and the lots of land never came into the custody of the State Court. The State Court certainly never placed the railroad and the lots in the possession of the officers of the Railway Company by a writ of replevin.

The original petition in the case, all the cross-petitions and the intervening petitions, were suits to enforce mechanics' or equitable liens against the Railroad, its rights of way and buildings, with the land on which same were situate.

The Amended Answer and Cross Bill of Arbuckle, Ryan & Company (Record 117) asserted their lien against the power plant and the lots of land upon which the same is situated, under Section 3184, Revised Statutes of Ohio, which reads as follows:

"A person who performs labor, or furnishes machinery or material for constructing, altering or repairing * * * * or for erecting, altering, repairing, or removing a house, mill, manufactory, or any furnace or furnace material therein, or other building, appurtenance, fixture, bridge, or other structure * * * by virtue of a contract with the owner, or his authorized agent, shall have a lien to secure the payment of same upon such * * * * house, mill, manufactory, or other building, or appurtenance, fixture, bridge, or other structure * * * and upon the material and machinery so furnished, and upon the interest, leasehold or otherwise, of the owner in the lot or land on which the same may stand, or to which it may be removed."

The Receiver was put in possession of the entire Railroad and its road-bed, poles, wires, rails and cars, as well as the

power house and machinery thereon and the lots upon which the same was situate. If there was any replevin suit started, it could affect only personal property, and the liens thus asserted against this power house and the lots on which it stood could certainly not have been determined therein.

As to what particular personal property was taken possession of by that alleged writ of replevin, we are left wholly in the dark, but even if the cars had been taken possession of, under the practice in Ohio they would be turned over to the plaintiff in such replevin suit, to-wit: the Railway Company, upon its execution of a bond, the bond thus executed taking the place of the property itself. The suit at law would proceed simply between the plaintiff and the defendant to determine who should recover judgment against the other. If the plaintiff recovered, his recovery would be the damages for the unlawful detention of the property by the defendant. If the defendant recovered, his damages would be the value of the property, for which he would have right of action against the bond. But in no event would the defendant recover back the possession of the property itself. By the delivery of the property to the plaintiff under the replevin writ, the property became the plaintiff's absolutely, could be proceeded against in any suit, and could be levied upon as any other property of the plaintiff, to the extent of his interest therein, but in a replevin suit no liens could be marshaled upon the property itself. That is, the *res* is not held for further disposition by the Court.

The action of Replevin was, in 1892, provided for by Sections 5814 to 5831, Revised Statutes of Ohio, being Chapter XI, Division 7, Title 1.

Section 5814 provided, "When possession of *personal property* may be recovered in an action as provided in this chapter."

Section 5816 provided: "The order for the delivery of the property to the plaintiff shall be addressed and delivered to the sheriff; and it shall contain the names of the parties, and the court in which the action is brought, and the sheriff shall be thereby commanded to take the property, deliver it to the plaintiff and make return of the order on a day to be named therein."

By subsequent sections provision is made for the execution of the order of delivery and the judgment in the action as follows:

Section 5818: "The sheriff shall execute the order by taking the property therein mentioned; and he shall also deliver a copy of the order to the person charged with the unlawful detention of the property, or leave such copy at his usual place of residence."

Section 5819: "The sheriff shall, except as provided in the next section, deliver the property so taken to the plaintiff, his agent or attorney, where there is executed by sufficient surety by plaintiff, a written undertaking to defendant, in at least double the value of the property taken, to the effect that the plaintiff shall duly prosecute the action, and pay all costs and damages which may be awarded against him; and the undertaking shall be returned with the order."

Section 5824: "When judgment is rendered against the plaintiff or demurrer, or he fails to prosecute his action to final judgment, the court shall, on application of defendant, assess to defendant proper damages, including damages for the right of property or possession, or both if he prove himself entitled thereto, or cause the same to be done by a jury, for which, with costs of suit, the court shall render judgment for the defendant."

Section 5826: "When the property is delivered to the plaintiff, or remains in the hands of the sheriff, as provided in section 5820, if the jury, upon issue joined, find for the defendant, they shall also find whether the defendant had the right of property, or the right of possession only, at the commencement of the suit; and if they find either in his favor, they shall assess to him such damages as they think right and proper, for which, with costs of suit, the court shall render judgment for defendant."

That, under these statutes, the bond given by the Plaintiff takes the place of the property itself, and that the property thus delivered to the plaintiff becomes his absolutely without regard to the subsequent decision of the replevin action, we cite the following:—

Jennings vs. Johnson, 17 Ohio, 154.
Smith vs. McGregor, 10 O. S., 461.
Lugenbeal vs. Lemert, 42 O. S., 1.

THE PENDENCY OF THE INJUNCTION PROCEEDINGS WAS NO BAR TO THE JURISDICTION OF THE FEDERAL COURT.

Equally without merit, is the contention that the Court below had no jurisdiction in this case to appoint a Receiver, because of the alleged pendency of another suit in injunction in the Court of Common Pleas of Ottawa County, Ohio.

It is charged that this cross action was brought by Tillotson for the purpose of eluding the jurisdiction in the State Court.

Judge Swan's opinion is quoted, where he says: "The responsible offenders were Tillotson and Richardson, who devised and procured the scheme apparently for the purpose of avoiding the effect of the action of replevin and of a suit in equity in the State Court," in the latter of which, as the Record shows, "Tillotson was still under injunction restraining him from interfering with the operation of the Railroad, to the control of which he asserted substantially the same rights as those pleaded in this Cross Bill here."

This language must be examined with reference to, and be limited by, the facts of the case.

The writ of injunction granted in this case enjoined The Industrial Mining & Guaranty Company, H. H. Warner, Carrothers and others, during the pendency of this suit, from selling, negotiating or otherwise disposing of the stocks and bonds of the said, The Put-in-Bay Water Works, Light & Railway

Company, now in their possession, or under their control, and received by virtue of the agreement made the 25th of June, 1892. (Record 15.)

The injunction proceedings in the State Court is thus described in the Answer of The Railroad Company. (Record 25.)

"On or about the 3rd day of September, 1892, the said Tillotson attempting to interfere with said Company in the operation of its said Railway, and to prevent the said Company from the peaceable enjoyment of its said property, the Common Pleas Court of Ottawa County, Ohio, on the petition of the said The Put-in-Bay Water Works, Light & Railway Company issued a restraining order enjoining the said defendant, J. K. Tillotson, from interefering, or attempting to interfere, in the operation of its said Railway, and which said restraining order is still in full force and effect."

The action of the Court thus referred to is more definitely stated in the affidavit of Carrothers in support of the motion to discharge the Receiver. (Record 37.)

"And thereupon, and to prevent the said Tillotson, his agents or servants, from such unlawful and forcible interference with the said Company's possession and operation of its property, the said Company obtained from the Common Pleas Court of Ottawa County, Ohio, a restraining order, a copy of which is hereto attached, marked Exhibit 'E.'" (Record 37-38.)

Exhibit "E", being a certified copy, is found on pages 38 and 39 of the Record, and we quote the injunction portion thereof:

"It is ordered and adjudged that the said defendants, and each of them be, and they are, hereby restrained and enjoined until the further order of this Court, from in any manner interfering with the said plaintiff's peaceable enjoyment of the possession and control of said The Put-in-Bay Water Works, Light & Railway Company, its property and business, and the said defendants, and each of them, are especially enjoined from shutting off the steam or stopping the pump so as to interfere with plaintiff's possession and operation of its property. It is

ordered that this decree *shall take effect upon Plaintiff giving an undertaking as provided by law*, in the sum of $5,000, to the satisfaction of the Clerk of this Court." (Record 38-39.)

Tillotson's injunction, therefore, restrained the Guaranty Company, Warner, Carrothers and others, from selling, negotiating, or otherwise disposing of the stocks and bonds of the Railway Company.

The Railway Company's attempted injunction was started to restrain Tillotson from interfering with the Company's possession.

We find it difficult, then, to see how Tillotson's injunction was a violation of section 720 of the United States Statutes.

Aside from the variance in the terms of the two injunction orders thus pointed out, it is to be particularly observed that it nowhere appears, either by the averments of the Answer, the statements of the Affidavit, or otherwise, that said injunction was ever served on, or otherwise brought to the notice of, Tillotson prior to his filing his Cross Bill, or that the same ever became operative as an injunction by the giving of the bond for $5,000, the giving of which *was imposed as a condition precedent to its effective operation*. The Certificate of the Clerk of the State Court is made ten days ater the date of the injunction order and fails to disclose that any such bond was given, or that summons was issued in the case, or that the injunction itself had been served upon Tillotson. As to the claim, therefore, that the appointment of the Receiver was a violation of the injunction and a contempt of the State Court, the failure to give bond is sufficient answer.

The statutes of Ohio at that time provided as follows:

Section 5576, R. S. of Ohio: "No injunction, unless otherwise provided by special statute shall operate until the party obtaining the same gives an undertaking executed by sufficient security, to be approved by the clerk of the court granting the injunction, in an amount to be fixed by the court or judge

allowing the same, to secure the party enjoined the damages he may sustain if it be finally decided that the injunction ought not to have been granted."

Section 5577 of the Revised Statutes of Ohio, provides:—

"The order of injunction shall be addressed to the party enjoined; shall state the injunction, and shall be issued by the clerk; when the injunction is allowed at the commencement of the action, the clerk shall endorse upon the summons 'Injunction allowed', and it shall not be necessary to issue the order of injunction."

The injunction in the State Court in this instance then being allowed on the condition of the giving of a bond, and the clerk's Certificate of the proceedings of the Court failing to show that the summons was issued and endorsed "Summons allowed," and no evidence in any form being disclosed to show either of these facts, or to show notice of the injunction by Tillotson, we contend that no injunction did issue, and are forced to the irresistible conclusion that the affidavit of Mr. Carrothers wherein he says "he obtained a restraining order," goes no further than to mean that he got a conditional order, but does not mean that the order ever became effectual by giving the bond and being served.

Furthermore, if we were to concede the existence of the injunction, as such, and its power to bind the conscience of Tillotson and to subject him to penalties at the hands of the State Court for contempt, we nevertheless submit that such fact would not affect the *jurisdiction* of the Federal Court. If the lower Court otherwise had jurisdiction, it would be in no manner taken away or diminished by the injunction of the State Court.

McKin vs. Voorheis, 7 Cranch., 279.

"To the rule permitting courts of one state in proper cases to enjoin persons within their jurisdiction from instituting legal proceedings in other states or from further proceedings in actions already begun, there exists the exception that state

courts cannot enjoin parties from proceeding in the Courts of of the United States nor the latter enjoin them from proceeding in the former courts; an exception based upon the peculiar grounds of municipal and constitutional law."

Story Eq.. sec. 900.

Story on Const., sec. 1757.

Moran vs. Sturges, 154 U. S., 256-268.

Peck vs. Jenness, 7 How., 612.

It is, however, apparently contended that the *pendency* of the replevin and injunction cases defeat the jurisdiction of the Federal Court. This claim will not bear investigation.

In the first place, the allegations and proof of such pendency are not made with sufficient clearness. As a defense the pendency of the prior action is not a favored one and the facts on which it is based should be made to appear clearly and with certainty.

Green vs. Underwood, 86 Fed., 427.

Hughes vs. Green, 84 Fed., 833.

Moffitt vs. Quine, 95 Fed.. 199.

Wetmore vs. Rymer, 169 U. S., 115.

Story Eq. Pl., sec. 736. et seq.

Passing over the method and extent of proof, however, and treating the affidavit as competent proof, such proof clearly shows that the Cross Bill of Tillotson in the suit at bar provided relief much more far-reaching than any possible to him as a defendant in the cases in the State Court. When such is the case a former suit is no bar to the second.

Watson vs. Jones, 13 Wall., 679.

Even if we concede his right to file a Cross Bill in either, or both, of said actions, praying for the relief prayed for in this suit, he was not bound to take such action but had the right also to bring his independent action in another tribunal having jurisdiction.

Washburn &c. Co. vs. Scutt, 22 Fed., 710.

Rapier vs. Paper Co., 64 Ala., 330.

Osborn vs. Cloud, 23 Ia., 104.

But the more insuperable objection to the claim that the former actions defeated the jurisdiction of the Federal Court in this suit lies in the relation existing between the State and Federal judiciary. That the State Court in the replevin case did not seize the property which is the subject matter of the present action, and that the matter in litigation and relief prayed for in that case were necessarily different than those of this action have been shown above. In like manner it is clear that the injunction case in no way amounted to a sequestration of the property involved in the Federal suit, nor did it in any other manner bring the *property* into the custody of the State Court. Therefore, treating the earlier cases as in effect purely *in personam*, and in no respect *in rem*, they clearly do not fall within the rule that forbids the Federal Courts to disturb the possession of the State Court.

It is conceded that where a Court has taken jurisdiction of a controversy relating to specific tangible property *and has taken that property into its possession, its jurisdiction over the whole controversy becomes exclusive.*

Peck vs. Jenness, 7 How., 612.
Taylor vs. Caryl, 20 How., 583.
Freeman vs. Howe, 24 How., 450.
Covell vs. Heyman, 111 U. S., 176.
Heidritter vs. Oil Cloth Co., 112 U. S., 294.
Coal Co., vs. McCreery, 141, U. S., 175.

But the basis of this rule is the possession as was said by Miller, Judge, in Buck vs. Colbath, 3 Wall., 334-342:

"This principle" (referring to the exclusive jurisdiction of the Court first acting) "has its limitations or, rather, its just definition is to be attended to. It is only while the property is in the possession of the Court, either actually or constructively, that the court is bound or professes to protect that possession from the process of other courts."

So, too, in the absence of possession and in the exercise by a State Court of a jurisdiction *in personam*, no exclusive right in such Court is recognized.

Stanton vs. Embrey, 93 U. S., 548.
Latham vs. Chafee, 7 Fed., 520.
Watson vs. Jones, 13 Wall., 679.

"It is not true that a court having obtained jurisdiction of the subject matter of a suit and of parties before it, thereby excludes all other courts from the right to adjudicate upon other matters having a very close connection with those before the first court, and in some instances requiring the decision of the same question exactly. On examining into the exclusive character of the jurisdiction of State Courts, we must have regard to the nature of the remedies, the character of the relief sought and the identity of the parties in the different suits."

Buck vs. Colbath, 3 Wall., 334.

"As between State and United States Courts the rule is applicable that the one which has first obtained jurisdiction in a given case must retain it exclusively until it disposes of it by a final judgment or decree. But when the pendency of such a suit is set up to defeat another, the *case* must be the same. There must be the same parties, or at least such as represent the same interests; there must be the same rights asserted and the same relief prayed for. This relief must be founded on the the same facts and the title or essential basis of the relief must be the same."

The identity in these particulars should be such that if the pending case had already been disposed of it could be pleaded in bar as a former adjudication of the same matter between the same parties.

Per Miller, J., Watson vs. Jones, 13 Wall., 679-715.

Such identity as that mentioned above does not exist where, as in this instance, the *position of the parties as plaintiff and defendant in the State Court are reversed in the later case in the Federal Court.*

"In all cases to sustain a plea of the pendency of another action in abatement of a second suit two things must generally concur:—

"First, That the second suit should be by the same plaintiff, and against the same defendant.

"Second, That it should be for the same cause of action. 'All the authorities agree,' says Judge Story, 'that the plaintiff must be the same, for otherwise the cause of action cannot in a just and legal sense be the same.' Wadleigh vs. Veazie, 3 Sumner, 167."

Per Swan, J., Seymour vs. McDonald Lumber Co., 58 Fed., 957-961.

The case last above cited was decided by the Circuit Court of Appeals for the Sixth Circuit, about the time of its decision of the Appeal in the case at bar.

In the Seymour case Judge Swan's attention was more particularly called to the subject of the pendency of the prior action and his decision in that case is entitled to far more weight than are the loose and ill-considered statements found in his opinion in the Appeal case at bar.

That the quotation of Judge Swan from the opinion of Judge Story in the Wadleigh case accurately states the law applicable to the question under discussion, is clearly indicated by the authorities:

Wadsworth vs. Johnson, 41 Cal., 61.
Screw Co. vs. Blivin, 3 Blatch., 240.
Barr vs. Chapman, 5 Ohio Cir. Ct., 69.
Washburn, etc., Co., vs. Scutt, 22 Fed., 710.
Rapier vs. Paper Co., 64 Ala., 330.

None of the cases cited in Appellant's Brief, pages 35-36, conflict with the principles above stated.

Chetwood's case itself distinctly recognizes the existence of exceptions to the general rule, although its decision does not call for their statement.

The following cases are in point upon the question and are distinctly in favor of the jurisdiction of the Federal Court in this class of cases:

Merrett vs. American Barge Co., 79 Fed., 228.
Gordon vs. Gilfoil, 99 U. S., 168.
Green vs. Underwood, 86 Fed., 429.
Rogers vs. Pitt, 96 Fed., 677.
Ryan vs. Seaboard, &c., Co., 89 Fed., 407.
Breudal vs. Church, 82 Fed., 262.
Gamble vs. San Diego, 79 Fed., 500.
Shaw vs. Lyman, 79 Fed., 3.
Denney vs. Ins. Co., 78 Fed., 4.
Marks vs. Marks, 75 Fed., 332.
Short vs. Hepburn, 75 Fed., 113.
Muskegum vs. Clark, 62 Fed., 698.
Wilcox vs. Ins. Co., 61 Fed., 200.
Leggett vs. Glenn, 51 Fed., 389.
Sharon vs. Terry, 13 Saw., 392.
Pierce vs. Feagans, 39 Fed., 587.

Tested, therefore, by these principles it is clear that the cases pending in the State Court in replevin and in injunction, wherein Tillotson was defendant, were no bar to the jurisdiction of the Federal Court to entertain a Cross Bill, wherein Tillotson in effect became plaintiff, and wherein was sought a further relief touching real estate which could not have been included in the replevin suit, and which was not either actually or constructively brought into the State Court's possession by the injunction case.

ALTHOUGH THE CIRCUIT COURT WAS SUBSEQUENTLY ADVISED OF THE CLAIM THAT ITS JURISDICTION WAS INVOKED BY A COLLUSIVE MISSTATEMENT OF THE AMOUNT INVOLVED, NO DEFECT OF JURISDICTION APPEARED AT THE TIME THE RECEIVER WAS APPOINTED.

We have been particular in our discussion of the claim

made by Appellant in respect to the pendency of the replevin and injunction proceedings, because it is claimed with much confidence that the lack of jurisdiction of the United States Circuit Court was at all times apparent upon its record from and after the filing of the Answers thereto on September 26th, 1892. (See Brief of Appellant, p. 26.)

We take issue squarely with this claim of Counsel. The allegations of the Answers respecting the replevin and injunction proceedings we have already considered. From these we have seen that no claim can be made that in this respect the Answers disclose the lack of jurisdiction. It remains, therefore, to discuss the question whether a defective jurisdiction arising from lack of jurisdictional amount in the Complainant's real claim, or from collusion on its part with Tillotson, so appeared, either in these Answers or otherwise upon the record, as to advise the Court below that it was without jurisdiction, under Section 5 of the Act of March 3d, 1875, prior to the date of the first issue of Receiver's Certificates, October 15th, 1892, to October 28th, 1892. The Bill did not disclose any infirmity. It sought the foreclosure of a lien on which more than $2,000, exclusive of interest and costs, was due against a resident and citizen of Ohio in favor of a resident and citizen of Illinois, making, as defendants also, persons claiming an interest in the property, who in no instance were residents of Illinois.

On its face this Bill gave jurisdiction.

Farmers' Bank vs. Hoof, 7 Pet., 168.
Sewall vs. Chamberlin, 5 How., 6.
Hulsekamp vs. Teel, 2 Dall., 358.
Culver vs. Crawford, 16 Pet., 97.
Kanounse vs. Martin, 15 How., 198.
Vance vs. Vandercock, 170 U. S., 478.
Peeler vs. Lathrop, 48 Fed., 780.
Riggs vs. Clark, 71 Fed., 560.
Johnson, etc., Co. vs. Kutman, 54 Fed., 574.

The averments of the Cross Bill of Tillotson do not disclose any infirmity of jurisdiction, and the case thereby presented was so far germane to the subject matter of the Bill as clearly to be within the Court's jurisdiction to entertain, and on which the Court had power to grant the desired relief if ultimately warranted by the proof.

In this connection we quote the language of Judge Taft in rendering his opinion upon the appeal of this case. (To be found on page 68 of the Record).

"Nor can I agree that the cross-bill of Tillotson was not germane to the action as brought in the bill. The bill prayed for a foreclosure of the lien, a sale of the railway, and, as incident and necessary to such reliefs, a marshaling of all other liens upon the property and a distribution of the proceeds among the lien-holders and others interested. It was proper for each defendant to set up his right in the property or its proceeds. Tillotson claimed a mortgage lien on the property to secure certain bonds, his title to which had been disputed by another defendant. The complainant was entitled to have both claimants brought in so that the property might be sold free from the lien of the claim in dispute between them. Being in court, their rights to the proceeds of the sale to be decreed under the prayer of the complainant must necessarily be determined before a distribution would be made, and this would, of course, involve the settlement of the entire dispute as to the title between them. I am not prepared to say that Tillotson's Cross Bill did not, on its face, state a good case for equitable relief. It is not necessary now to decide the question."

The Bill and this Cross Bill of Tillotson's were the only pleadings on file at the time the Receiver was appointed. Under them it is claimed there was apparent jurisdiction. There was an appeal to a Court of competent jurisdiction, regarding an apparent controversy, shown to exist for an amount apparently sufficient, and between parties of requisite citizenship.

Nothing appeared that was not perfectly consistent with the existence of the jurisdiction conferred by the Bill. Such jurisdictional facts appearing by the Bill, and no evidence of collusion appearing on the Cross Bill, an objection to the jurisdiction at that time would necessarily have been overruled.

Ross vs. McGuffin, 2 Wills., Civ. Cas. Ct. App. (Texas) 458;
Parham vs. Hardin, 11 Iredell Law, 219.
Cummings vs. Edmondson, 5 Port., 148.

These cases arose under statutes very similar in effect and form with that of March 3d, 1875, and under this latter statute the same doctrine has been laid down by at least one Court, in the case of Moffitt vs. Quine, 95 Fed., 199, where the Court says:

"It is sufficient to sustain the jurisdiction of the Circuit Court, where the requisite jurisdictional facts are shown by the complaint, that it does not at any time thereafter satisfactorily appear to the Court that the suit does not really and substantially involve the jurisdictional amount."

In the face of this declaration, it seems a safe conclusion that until it is thus made to appear, the Court may presume and act upon the presumption of jurisdiction.

The Court below acted, in fact, upon such presumption, and on September 10th, 1892, appointed a Receiver. (Record 11.)

Counsel for Appellant say this appointment was made without notice and upon the averments of the Cross Bill only, the Bill, it is said, being merely a device whereby Tillotson secured such action.

This claim does the lower Court injustice. No such device appeared on the record and there was clear equity in *behalf of the complainant* to have a Receiver take possession of the property covered by his lien, when contending factions were wrangling over the right to an administration of that property, to complainant's manifest disadvantage and possible loss.

But it matters not now whether the averments of the pleadings warranted the appointment, or were true or false in fact, or whether the appointment was, or was not, made upon sufficient notice. These matters were debated in the Court below, upon a motion to discharge the Receiver, and are not reviewable in this proceeding. Here, we are concerned only with the question of the existence of the power to appoint, and not with the question whether or not, error intervened in the exercise of the power.

Between the date of the appointment of the Receiver, September 10th 1892, (Record 11) and the date of the order to issue certificates, October 15th, 1892, (Record 30) the only additional pleadings filed were the intervening petition of Arbuckle, Ryan & Company, filed September 3d, 1892, (Record 26) and the Answers of Carrothers and the Railway Company, to the Bill and to Tillotson's Cross Bill, filed September 26th, 1892. (Record 16-26).

It is not claimed, of course, that any defect of jurisdiction was disclosed by the pleading filed by Arbuckle, Ryan & Company. On the other hand, it is claimed (Brief p. 26) that from the time of the filing of the Answers there "was not a moment when the Court was not apprised of the fact that its jurisdiction had been imposed upon."

Let us examine the pleadings with a view of ascertaining whether this statement is correct.

The averments of these Answers, so far as the same relate to matters jurisdictional, consist of the following, and of the following only:—

1. A denial that the materials sold by complainant to the Railway Company were of the value alleged in the Bill, to-wit, $2,787.04. (Record 17).

2. A statement *on information and belief only* that such material amounted in value to about the amount of $700.00, and no more. (Record 17).

3. A statement that a large part of said material (but what amount is not stated) was furnished for use in Hotel Victory, to complainant's knowledge. (Record 17).

4. A statement that Tillotson procured the complainant to include both amounts in one lien, to perfect such lien, and to bring this action to foreclose the same. (Record 17).

5. A statement that the Railway Company had obtained possession of its railway by virtue of a writ of replevin (sic), but from whom is not stated (though inferentially from Tillotson), nor is the then pendency of the replevin suit alleged. (Record 20).

6. A statement that on September 3d, 1892, the Railway Company procured the Ottawa County Common Pleas Court to issue a restraining order, and the conditions of said order. (Record 25).

Merely to deny the amount of complainant's claim did not oust the Federal Court's jurisdiction, nor did the partial admission that complainant's claim was valid to the extent of $700.

Kinkle vs. Brown, 99 Fed., 593.

Rae vs. Railroad Company, 14 Fed., 402.

Lozano vs. Wehmer, 22 Fed., 755.

The other averments of the Answers above referred to do not amount to an averment of collusion. Although it is alleged that a large part of the claim sued upon was material furnished to Hotel Victory, it does not appear from any averments, but that enough remained, furnished to the Railway Company, to be within the Court's jurisdictional amount.

It is submitted that it was perfectly proper for Mr. Tillotson to suggest to the complainant to institute this action, even though said institution should indirectly be to the benefit of Mr. Tillotson, provided the jurisdiction over such action, in fact, existed. Nothing is more common in practice. Many States, recognizing the underlying equity to such proceedings, have provided statutory methods whereby parties can compel the

present institution of litigation, the delay of which may be prejudicial. No fraud would have been practiced upon the Court merely from the fact that Tillotson induced the Complainant to bring the present action, had that action been, in truth, for an amount within the Court's jurisdiction.

In like manner, had the complainant's action been, in truth, for an amount within the Court's jurisdiction, no fraud would have been practiced upon the Court, or its jurisdiction, by inducing the complainant to include Tillotson as one of the defendants.

Tillotson claimed an interest in the division of any proceeds of the Railway Company's property remaining after the satisfaction of its other and prior creditors. The subject matter of his Cross Bill presented for the Court's adjudication his rights in such controversy.

We refer again to the quotation above from the opinion of Judge Taft, and submit that this statement is an accurate representation of the actual facts of the controversy. The claim, therefore, that a lack of jurisdiction, because of collusion, appeared upon the face of the Bill, Cross Bill of Tillotson, Cross Bill of Arbuckle, Ryan & Company, or of any of the Answers in the case, completely fails.

It seems that Counsels' argument that jurisdiction failed upon the averments of the Answers is based upon a confusion that has resulted from the attempt to carry back into the record, as it stood immediately upon the filing of the Answers, facts which were not developed until the subsequent coming in of the Terry Affidavit.

It is true that it *subsequently developed* that Tillotson not only procured the complainant to bring the action and to make him (Tillotson) party (matters not wrongful in themselves, as above shown), but also procured the complainant to give a colorable jurisdiction by falsely over-stating the amount of its

claim; but we must distinguish carefully between the facts subsequently ascertained and the facts as they appeared at the time the Receiver was appointed, and at the time the Receiver's Certificates were authorized and negotiated. As a matter of fact, to no Court was it made to appear that there was any infirmity in the jurisdiction of the Court until a judicial determination of the facts resulting in such effect was had by the Circuit Court of Appeals in May, 1893.

Whether, however, the date at which the jurisdiction failed be fixed at May, 1893, or at the time of the hearing before Judge Ricks, December 22d, 1892, can make no difference. Even if it is to be related back, it can go no further back than November 12th, 1892, when Terry's Affidavit was filed, disclosing and putting upon record evidence which, when acted upon, justified the action of the Court.

It cannot fairly be claimed that jurisdiction failed the moment the Answer was filed, even though that Answer might put the Court on inquiry. The Judge is the Court, and the Court is put on inquiry when the Judge's judicial action is invoked. In this case appearance day for Defendant was the first Monday of October, 1892, and the Answer day the first Monday of November. How can it be said the Judge had notice of allegations of an Answer filed long before it was required to be filed by the rules of the Court, in the absence of some motion, directly calling the Judge's attention to the pleading?

THE RECEIVER'S CERTIFICATES OF OCTOBER 15TH, 1892, WERE VALID CHARGES.

Thus far we have seen that prior to the filing of the Terry Affidavit there was nothing in the record disclosing a want of jurisdiction; that the claim made that such jurisdiction was defeated by the pendency of the replevin action is unfounded; that the claim that such jurisdiction failed because of the injunction proceeding is based upon misapprehension and failure

of proof; that the charge of collusion, excepting in the one matter of overstatement of complainant's claim, is not made out; and that as to the matter of collusion in respect to the amount of complainant's claim, knowledge of the defect was not in the Court's possession prior to November 12th, 1892; and, finally, that at the date last named, the Receiver was in possession of all the property.

This appointment of the Receiver being made by a Court having apparent jurisdiction, possession taken by such Receiver was a possession under color of right, and whether or not, in truth, the property in question ought ever have come into the possession of such Receiver, it came, not as the result of a mere trespass, but to an officer dependent upon, subject to the orders of, and entitled to protection from, the Circuit Court of the United States.

Any questions, therefore, respecting the rightfulness of that possession or respecting the disposition to be made of the property thus possessed, were thenceforth to be determined by that Court, and by that Court exclusively.

Freeman vs. Howe, 24 How., 450.
Compton vs. Jessup, 15 C. C. A., 397.
Gumble vs. Pitkin, 124 U. S., 131.
Moran vs. Sturges, 154 U. S., 256.
Taylor vs. Caryl, 20 How., 583.

One question concerning that possession arose immediately. The Receiver found that the property was liable to waste and destruction unless properly housed and protected. Therefore on October 15th, 1892, nearly a month before the infirmity of the Court's jurisdiction became known, he applied to the Court for authority to borrow money to protect that property from impending loss.

It is clear, of course, that this was a proper ground for the ordinary exercise of the Court's discretion in issuing Receiver's Certificates.

Meyer vs. Johnston, 53 Ala., 237.
Wallace vs. Loomis, 97 U. S., 146.

Complaint is made that these Certificates were authorized without proper notice. If so, it was simply an irregularity not affecting the jurisdiction, and is not subject to review in this proceeding. It would seem, however, that the objection is not well taken. The defendant Railway Company had answered in the case and was represented by diligent and able Counsel. The first report of the Receiver shows that the negotiation of the Certificates did not take place until about the 28th of October, 1892, so that ample time seems to have remained for the defendant Company to obtain a rehearing by the Court of its order in the premises had such been desired.

It would seem a fair inference from the record that the Company acquiesced in the expenditure for the evidently necessary expense of protecting its own property.

Humphrey vs. Allen, 111 Ill., 490.
Beach on Receivers, sec. 399.

Be that, however, as it may, it is clear that these Certificates were issued for a legitimate purpose and were negotiated before any infirmity of jurisdiction appeared. Subsequent investigation by the Court (Record 76) developed the fact that they came into the hands of a party, without knowledge of any such infirmity, and who relied upon the condition of the record at the time of their negotiation.

Does then the statute of March 3d, 1875, have the retroactive effect of making void everything done prior to the discovery of the lack of jurisdiction, including the Certificates issued under these circumstances? This would be retroactive law with a vengeance. Here the agent of the Court takes possession of the property, borrows money to the extent of $5.000.00, takes care of the property, pays its debts, builds and repairs its buildings, under orders given at a time when there is no notice to any one, Receiver or purchaser, of any want of jurisdiction

which would cast even a cloud upon the title derived therefrom, and the Court is asked to turn back the property preserved from injury and destruction, greatly added to in value, without protecting its own officers for expense thus incurred by the express direction of the Court.

Is it possible that in a Court of Equity such construction of this Act is to be maintained? We have not only innocent purchasers, but purchasers who from an inspection of the record find nowhere that the Receiver is without permission to borrow this money which has been expressly made a lien on the property in his hands.

It is said that a trustee holding tortiously cannot ask compensation for improvements made by him upon the property. This is not a case of a trustee. It is the Court who ordered these improvements and which decreed that the property be expressly subjected to a lien for the money used in making them. To hold that under such circumstances a party who in good faith has purchased the Certificates, relying upon the apparent jurisdiction to issue them, should be deprived of his right to look to the specific property pledged to their payment, and in lieu thereof take, as suggested by Counsel for Appellant, the uncertain value of a personal judgment against Tillotson, would be the means of requiring the Circuit Court to commit a most glaring fraud upon its own creditors, and thereby utterly to nullify the well accepted doctrine that Courts, at least, must pay their debts, whether or not other persons do so.

III.

HAD THE COURT POWER TO IMPRESS THE PROPERTY WITH THE LIEN OF COSTS AND CERTIFICATES, OR EITHER?

We have now come, in chronological sequence, to the time when it appeared to its satisfaction that the Court was, in fact, without jurisdiction, because the amount involved did not

exceed $2,000.00, and we finally reach the discussion of principles that will answer affirmatively the above question.

The contention of complainant is, that upon the discovery of this lack of jurisdiction the Court was required, not only to proceed no further, but at once to dismiss the cause entirely. The refusal of the Court to do so is the gist of its complaint.

The statute of March 3d, 1875, does not in terms require such action. It provides that upon its being made to appear to the Court's satisfaction that the defect of jurisdiction from any of the causes mentioned exists, such Court "shall proceed no further therein, but shall dismiss the suit, or remand it to the Court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

In Williams vs. Nottawa, 105 U. S., 209-211, it is said:

"This statute imposes the duty on the Court of its own account to stop all further proceedings and dismiss the suit, the moment a fraud is discovered."

In Farmington v. Pillsbury, 114 U. S., 138, it was stated that the old rule requiring the objection to citizenship, unless appearing on the face of the record to be pleaded, was changed by the Act of 1875, under which Act the Federal Court can dismiss for want of jurisdiction at any time.

In Hertog vs. Memory, 116 U. S., 588, it was held that where the citizenship of the parties was alleged in the declaration, and was such as, if truly stated, gave the Court jurisdiction, and the defendant purposely omitting to make known his citizenship, pleaded to the merits, the question of citizenship did not arise, and evidence by the defendant contradicting the allegations of the declaration as to his citizenship are irrelevant and afforded no basis for the dismissal of the suit.

In Vol. 29, L. Co-Op. Ed., p. 726, where the above case is reprinted, it is laid down, that while the requirement which formerly existed, that a plea of abatement was the only method by which question of jurisdiction could be raised, and that a

plea to the merits was a waiver of plea to the jurisdiction, was not in force, yet that in its general scope this rule has not been altered by the Act of 1875.

The Court then states that owing to the old rule, Courts were prevented from taking notice of colorable assignments or transfers to create cases for the general jurisdiction of the United States Courts in the absence of the plea of abatement; hence, "We held in Williams vs. Nottawa, 105 U. S., 209-211, that the statute changed the rule so as to *allow* the Court at any time, without plea, and without motion, to stop all further proceedings and dismiss the suit the moment a fraud on its jurisdiction was discovered."

The Court further says:—

"Neither party has the right without pleading at the proper time and in the proper way, to introduce evidence, the only purpose of which is to make a case for dismissal. The parties cannot go behind the averments of citizenship in the record except by a plea to the jurisdiction, or some other proper method. The evidence must be directed to the issues, and it is only when facts material to the issue show there is no jurisdiction that the court can dismiss the case upon motion of either party."

"If in the course of a trial it appears by evidence which is admissible under the pleadings and pertinent to the issues involved, that the suit does not really and substantially involve a suit which the Court has cognizance, or if the parties have been improperly or collusively joined for the purpose of making a cognizable case, the Court *may* stop all further proceedings and dismiss the case."

In Barry vs. Edmonds, 116 U. S., 550, it was held that the Circuit Court *cannot* dismiss a cause on the ground that it does not involve a dispute or controversy within its jurisdiction, unless the facts when made distinctly to appear on the record, create a *legal certainty* of the conclusion based on them.

Again, it is said, in the same case: "Upon a personal conviction, however strong, a court would not be at liberty to act, unless the facts upon which the persuasion is based, when made to distinctly appear on the record, create a legal certainty of the conclusions based on them. Nothing less than this is meant by the statute when it provides that the failure of its jurisdiction on this account shall appear to the 'satisfaction of the Circuit Court.'"

The same doctrine is held in Duputron vs. Young, 134 U. S., 241.

The cases of Morris vs. Gilmer, 129 U. S., 315,
Ry. Co. vs. Swan, 111 U. S., 379,
Blacklock vs. Small, 127 U. S., 96,
Williams vs. Nottawa, 105 U. S., 209,

And the other cases, relied upon by Counsel for Appellant, all contain strong expressions relative to the duty of the Court, under the circumstances presented by each of those cases, at once to dismiss the action; but it is to be observed that *in not one of those cases were the rights of any third party involved,* and no injustice accrued by a dismissal; all the loss and expense caused thereby falling upon the guilty party.

In the case at bar it is to be noted that from the time the mandate of the Court of Appeals came down to the Circuit Court, the latter Court, in effect, dismissed the actions made by the Bill and Tillotson's Cross Bill, and proceeded no further upon either of these pleadings; no orders were taken, no decree rendered, nothing was done in favor of them, or either of them, whatsoever. The property in the Court's hands was, however, at this time encumbered by Receiver's Certificates to the amount of nearly $8,000; of which the original issue of $5,000, of October 15th, 1892, were clearly issued under circumstances such that their repudiation would be a gross injustice to their holder.

The statute may be treated as mandatory, as regards further proceedings in the case, but it is not in terms mandatory as to the dismissal, but qualifies such action by giving to the Court a discretion in the exercise of this duty to shape its order in such manner as justice may require. This right to exercise an equitable power in shaping its dismissal order, was distinctly recognized by the opinion of the Court of Appeals upon the appeal of this case.

This opinion was followed by a mandate directing the lower Court to take such further proceedings in the case as *should accord with such opinion, (Record 54)* and the Court below, therefore, as has been above suggested, very properly considered itself bound by such opinion, and treated the case as one properly calling for the exercise of its discretion in this regard.

Mining Co. v. Billings, 150 U. S., 31.

The order of June 12th, 1894, (Record 74) made after the coming in of the report of Special Master Belford, (Record 71-73) was in direct accord with this mandate, and the equitable principle thereby recognized. The investigation made before the Master was made in compliance with the views of the Circuit Court of Appeals. (Record 70). Special attention in this connection should be given to the fact that this order of June 12th, 1894, was made with the full concurrence of the Railway Company, acting through its distinguished Counsel, Senator Foraker, and by the very terms of that order, the injunction bond of Tillotson was ordered to be taken from the files.

It was in accordance with the "requirements of justice" when the Railway Company asked the Court to restore the property to them, with the statement that it "was ready and willing, and then tendered a bond for the payment of all charges incurred in such Receivership that may be finally determined a first and prior lien upon the property of the Railway Company," for the Court to grant the prayer for the resto-

ration of said property, conditioned upon the giving of the bond for the payment of such charges incurred by the Receiver, including Certificates issued by him, as should be finally determined a lien on the property, and to direct that the Company should, in giving the bond, submit itself to the jurisdiction of the Court for that purpose, so that the bond when entered into should be effectual and its collection not resisted on the ground of want of jurisdiction.

It is not clear why the Appellant, having at one time expressed its willingness to give bond for the payment of these claims, if adjudged valid, should object to that part of the Court's order requiring it to submit to the jurisdiction of the Court, to the end that said bond should be enforced. Was the Appellant seeking to perpetrate a fraud upon the Court? If any of the charges as ultimately determined were not right, the remedy by appeal to a higher Court was easy. The Railway Company could at any time have had the property and enjoyed its possession for many years simply by giving a bond to pay the just and proper charges. What charges were just and proper after their determination were again open to review, not only by the Circuit Court, but by the proper Appellate Court.

Instead, however, of giving a bond, and forgetting, apparently, that the appointment of the Receiver, and the issuing of the Receiver's Certificates, were by a de jure court with a de facto jurisdiction, the Appellant now seeks to evade the payment of all charges, not as improper expenditures of money, but as expenditures void ab initio.

If the Supreme Court of the United States promulgates the doctrine that no matter how unquestioned is the jurisdiction at the time of the appointment of a R eiver, and of the incurring of charges made by him under order of the Court for the betterment of the property, yet if subsequent thereto

it is discovered that there was not the amount of $2,000 in controversy, and because of such ex post facto finding, all acts of the Court and the Receiver and the latter's charges for the care of the property are to be swept aside, it will be regarded as a most startling and inequitable conclusion of law by the highest Court of Equity in the world.

We are not entirely without the guidance of authority in arriving at this conclusion. Under circumstances in many respects parallel the Court has exercised a power to adjudicate concerning funds in the possession of a Receiver, although it had been determined that the Court was without jurisdiction over the case in which he was appointed by reason of collusion of parties. We refer to the case of Sage vs. The Memphis & Little Rock Railway Company, 125 U. S., 361. In this case it had been determined by the Circuit Court that its jurisdiction to take possession of the railroad property had not been used in good faith for the purpose of collecting a judgment alleged to have been rendered in favor of the complainant, but rather for the purpose of placing the property and business of the Railroad Company in the hands of the Court to be managed through a Receiver, to the end that such Company might not be subject to suits by its various creditors. This procedure was determined to be collusive, and the jurisdiction of the Court was held not to attach, and the Receiver directed to deliver back to the Railroad Company the property. Prior, however, to the ascertainment of these facts, large sums of money had come into the Receiver's hands from the operation of the road. It does not appear in the case that certificates had been issued. Therefore, unfortunately, the exact question here presented did not arise for determination in that case. But the Court did proceed to dispose of the net earnings of the property, while under the management of its officers, and this assumption of jurisdiction and power of the lower Court to

deal with this fund, as well as the actual orders made relative thereto, were approved and affirmed by the Supreme Court."

As we have just said, this case is not distinctly in point upon the exact question made upon this appeal; but it is submitted that the decision arrived at in that case could not have been made but upon the theory of the existence of a jurisdiction, even in collusive cases, to dispose of property in the Court's hands in a manner that shall be equitable.

The power to do this is all that is in question in this suit.

It is beyond contradiction that the Court below had discretion upon the dismissal as regards costs. The statute so provides specifically. In the very nature of the case the trial court is in better position to decide upon a proper order in this respect, and has much better opportunity for knowledge as to what justice requires in awarding them than any Appellate Court can have, and it is, undoubtedly, for this reason that the statute gives to that Court the power in question.

It is alleged in Appellant's argument that no precedent is to be found where all the costs had been taxed as they were in this case. There seem to be two answers to this contention; first, that the matter is discretionary under the statute; second, that the order was, in fact, made in the exercise of an undoubted jurisdiction, and hence, if erroneous, is not subject to review in this proceeding.

Moreover, a receivership is in the nature of an equitable attachment or execution. Money expended in taking care of property seized on attachment or execution by Marshal or Sheriff is always taxed as part of the costs, and in this view the expenses and charges of a receivership may well be treated as part of the costs in the case and be covered by the spirit, at least, if not the language of the statute under discussion.

We conclude, therefore, that under the terms of the statute itself the decree for the sale made in this case cannot be treated as one made without jurisdiction:—

1. Because under the terms of the statute there was jurisdiction to decree as to the costs, and

2. Because under the statute there was an equitable power reserved to the Court which was exercised in protecting the holder of the Receiver's Certificates.

But, independently of the statute, the jurisdiction to enter the decree rendered in this case may be sustained under a proper application of the rule laid down in Mail Company vs. Flanders, 12 Wall., 130.

This doctrine, in brief, is that there exists an inherent power in every Court to undo, so far as possible, the mischief caused by any order made by it before it becomes aware of a lack of jurisdiction. The doctrine of this case has never been questioned in this Court and its exceedingly equitable doctrine has been followed in other jurisdictions.

Thus in Booth vs. Ableman, 18 Wis., 495, where the State Sheriff had taken property from the United States Marshal by replevin (that is, under circumstances substantially identical with those in Freeman vs. Howe), while the State Court did not hesitate to declare itself without jurisdiction to try the main issues of the case, it nevertheless reversed the lower Court for *failing* to exercise a jurisdiction to make restitution of the property.

So in Close vs. Haming, 17 S. W., 850, (Texas), Haming sued out a writ of sequestration and obtained possession of the property. Upon subsequent discovery that the value of the property was beyond the Court's jurisdiction, the trial Court dismissed the case and refused the demand of Close, that the property taken by Haming should be restored to him. On appeal this judgment was reformed by ordering restitution.

These cases, although at first blush they seem favorable to the main contention of the other side, are cited to demonstrate the fact that a Court, even when it fails to have jurisdiction over a controversy brought before it, nevertheless, has a jurisdiction to decide upon and make an order concerning the possession of property taken by it before the discovery of its lack of jurisdiction.

It is contended that in this case the order of the Court should have been one of restoration to the defendant Railway Company (as in the Booth, Washburn and Close cases), and that the Court below should have so ordered. Whether the order entered in the Court below was the proper order, or not, or an equitable order, or not, is not material upon this appeal.

It is not sought here to reverse that order as erroneous. The jurisdiction to make the order is attacked. If that jurisdiction existed, as shown by the holding in the above cases, then the Court has power to hear and determine upon the question of restoration.

Nor do we understand that the Appellant seriously questioned in the Court below the existence of that jurisdiction to hear and determine as to restoration. In fact, it appealed to that jurisdiction by its repeated motions for such restoration.

If the contention now made by Appellant's Counsel is correct, the power of the Court below was limited to the power to dismiss the case. An order, however, for mere dismissal did not seem any more satisfactory to Appellant when in the Court below than to the Appellees. In that Court it desired the further order directing the Receiver to surrender to the Appellant the property in his possession. The contention of the Appellees, on the other hand, in the Court below, as in this Court, was at all times that there existed in that Court the jurisdiction and power to order concerning restitution. While they contended that such restitution should not be made except

upon certain equitable principles, yet they there, as here, insisted that the ascertainment of the facts on which these equitable principles rested, or indeed, the ascertainment of their non-existence, involved the power as well as the duty to make inquiry into the facts of the case, and that whenever the power to inquire into facts exists as precedent to the entry of an order or decree, jurisdiction necessarily exists, since jurisdiction is the power to hear and determine.

Sheldon vs. Newton, 3 O. S., 494.
U. S. vs. Arredondo, 6-Peters, 691.

As has been said above, in the Court below the Appellant here submitted itself to that jurisdiction—a submission that would have been entirely satisfactory, undoubtedly, had it resulted in a judgment in its own favor. But in a suit between A and B a jurisdiction to decide in favor of A and against B. likewise confers power to enter a judgment in favor of B and against A. To make the latter decision may be erroneous, but the decision when made is made in the exercise of jurisdiction and is not void.

The Court which has the power to hold a hearing and determine thereupon cannot deprive itself of jurisdiction by the entry of an erroneous decision. It seems, therefore, to Counsel for Appellees that the Appellant has mistaken its tribunal upon appeal and that its complaint is in reality a complaint concerning the erroneous exercise of jurisdiction that clearly existed, rather than concerning the non-existence of that jurisdiction; in other words, that the Appellant should have sought to reverse the decree of the lower Court by an appeal to the Circuit Court of Appeals of the Sixth Circuit, rather than by appeal to this Court, which can consider the question of jurisdiction only. The Circuit Court of Appeals had ample power to adjudge all questions raised here as well as these additional ones that Counsel seek to raise.

U. S. vs. Jahn, 155 U. S., 109.
Robinson vs. Caldwell, 105 U. S., 359.
1 Desty Fed. Prod., p. 646.

It is not to be understood by the above that it is conceded that the order actually entered by the Court below was inequitable. On the other hand, it was clearly equitable under the facts of the case. Throughout the argument by Counsel for Appellant the assumption has been uniformly made that the Receiver was in possession of certain property belonging to the Railroad Company, and that upon motion to dismiss, that property should have been returned to the Appellant. But there was another party equally at least entitled to protection —the holder of the Receiver's Certificates.

Looking at the essence of things, it is clear that what the Receiver originally took possession of was a certain railway property and a power plant, heavily encumbered. Of what these encumbrances consisted, at least in part, was determined by a subsequent reference in the case. While the report of the Master is not spread at large in the printed record in this case, his conclusions sufficiently appear in the motion filed by the Railroad Company, a copy of which appears in the printed record at pages 96 to 100.

We find, therefore, that the Railway, when taken possession of by the Receiver, was encumbered by labor liens (Record 98) to the amount of nearly $900.00; that a tax lien was subsequently adjudged, amounting to $1,400 at one time and nearly $600 at another. (See order of distribution).

In addition, shortly after the Receiver took possession, and before any motion for dismissal was filed, the property was equitably charged with the costs of certain necessary improvements and expenses of preservation amounting to nearly $3,000.00 more, and also with a proper charge for the expense incident to the Receiver's care and custody.

Properly, to protect all parties, it was eminently equitable to give back to the Company the property thus improved and cleared of liens only upon the condition that the expenses thereof should be paid.

Mail Co. vs. Flanders holds that restitution shall be made *so far as practicable*, and so far as practicable that is exactly what the Court stood ready to do and at no time refused to do.

IV.

DID THE FACT OF THE COURT'S POSSESSION CONFER THE JURISDICTION EXERCISED IN THE CASE?

Thus far we have concerned ourselves with the question of the power of the Court to protect the holder of the Certificates and its power to make an order as to costs.

We enter now upon another branch of the discussion: what duty, if any, did the situation cast upon the Court in behalf of the intervening lien claimants?

The claims of Arbuckle, Ryan & Company, Barbour & Starr, and the other intervenors present very interesting questions. Arbuckle, Ryan & Company, to be sure, were originally named as defendants to the Bill, but they were not served until after the property came into the hands of the Receiver and their position in the case is essentially that of intervenors. Barbour & Starr were not named originally as parties, but at all times have been there as intervenors, coming in upon leave of Court. (Record 49). The Bodifield Belting Company and Atlantic Trust Company occupy the same position.

All this property being in the hands of the Court's Receiver *colore officii*, the holders of the mechanics' liens were thereby prevented from asserting their rights and claims against the property, before any other Court. The Federal Court, therefore, had not only the right to hear, but it was its duty to hear them and adjudicate upon their claims, even

though the order under which such possession had been taken was erroneous, irregular or even absolutely void.

Gumbel vs. Pitkins, 124 U. S., 131.

In the case last cited, various creditors obtained attachments on Sunday from the United State Circuit Court. These attachments were levied on Sunday and the issue and levy thereof was in violation of statute. On the day following, while the Marshal was in possession under these attachments, Gumbel obtained a writ of attachment from the State Court, under which the Sheriff came to the place where the property was situate for the purpose of serving his writ, and attempted entrance; which the Marshal refused. The Marshal preserved his possession without interruption from the moment of seizure down to the time he sold the property, under writs of attachment issued from the United States Court subsequent in time to Gumbel's attachment,—the Sunday writs being abandoned.

The question arose as to the right of Gumbel, under his attachment from the State Court. The lower Court adjudged against the intervenor and dismissed his petition of intervention, holding that the Sheriff made no seizure and took no possession of the property, and further holding that the property must be distributed according to the priority of the writs that were issued from the United States Court upon Monday. The Supreme Court fully concurred with the view taken by the lower Court, that the possession of the Marshal under the Sunday writs was void, and that he was a trespasser in taking and maintaining possession, but distinctly held that the equitable powers of the Courts of the United States over their own process to prevent abuse and injustice are inherent and as specific as the necessity for their exercise requires; and that the Court which had wrongfully taken possession was entitled to administer equity in the case and grant to the intervenor suitable and proper relief.

The Court says at page 156: "When the Sheriff of the District Court undertook to levy on the goods in question and served the Marshal with notice as garnishee holding actual possession of the property, the latter was in fact, as we have already seen, in possession illegally under a writ which protected his official position only so far as to prevent the property from being forcibly withdrawn from the jurisdiction of the Circuit Court by judicial process, that Court *having acquired jurisdiction*, by virtue of the seizure under color of its authority, to decide all questions concerning it. That writ, though illegally issued and levied, was not void on its face. In a certain sense, therefore, the property was *in custodia legis*, and not subject to a levy under process which would have the effect of taking it out of his possession and control."

The case, therefore, stands thus: "for the reasons growing out of the peculiar relations between Federal and State Courts exercising co-ordinate jurisdiction over the same territory, the Circuit Court acquired the exclusive jurisdiction to dispose of the property brought into its custody under color of its authority *although by illegal means and to decide all questions of conflicting right thereto.*"

While great stress may be laid upon this case, it does not stand alone. It is the logical and necessary corallary to be drawn from the case of Freeman vs. Howe, 24 How., 450, and is amply supported by the case of Compton vs. Jessup, 68 Fed., 263, and has been abundantly recognized since its promulgation as an accurate statement of the principles that must necessarily guide United States Courts in their relation to the State Courts.

In Compton vs. Jessup, 15 C. C. A. R., 397, 68 Fed., 263, the Court, Judge Taft, speaking for the Court, says:

"Necessity and comity both require that where by its officers acting under color of its orders or process, a Court has taken into its custom property of any kind, another Court, though of equal and co-ordinate jurisdiction, should not be per-

mitted either to oust the possession of the first court or in any way interfere with the complete control and disposition of the property for the purpose of the cause in which its action has been invoked."

Again:

"Every Court has *inherent equitable power to prevent its own process from working injustice to any one* and may entertain a petition by aggrieved persons, either in form of simple motion or by intervention *pro interesse suo* in the cause in which the process issued, or by ancillary or dependent bill in equity, and may afford such relief as right and justice require."

It has been held also in other cases in the Federal Courts that where the United States Court has actual possession of property in which third parties claim an interest, the latter are by the fact of possession itself prevented from pursuing their ordinary remedy against the property in the State Courts, and, therefore, have the right to appeal to the Federal Court and save their rights and protect their interests regardless of adverse citizenship, or other disqualifying conditions.

Conwell vs. Canal Co., 4 Biss., 195.
Minn. Co. vs. St. Paul Co., 2 Wall., 609.
Krippendorf vs. Hyde, 110 U. S., 276.
Pacific Ry. Co. vs. Mo. Pa. Ry. Co., 3 Fed., 772.
Central Trust Co. vs. Bridges, 57 Fed., 753.
Taylor vs. Caryl, 20 How., 583.
Farmers L. & T. Co. vs. San Diego Co., 49 Fed., 188.
Heidritter vs. Oil Cloth Co., 112 U. S., 294.
Morgan, &c., Co. vs. Texas Central Ry. Co., 137 U. S., 171.

In many of these cases the holding of the Court goes much further than is required to sustain the jurisdiction of the lower Court in the case at bar.

In this case the possession of the Receiver was not that of a trespasser, and it is indisputable that some, at least, of the questions as to the disposition of the property could not be

worked out in any other Court than in that of which he was the arm. For instance, the claim for taxes upon the intervention of the Treasurer of Ottawa County was clearly of this nature.

Re Tyler, 149 U. S., 164.

That the same rule must apply to the mechanics' liens seems apparent.

Prior to the time when it became necessary, or even proper, for the lower Court to decide what relief, if any, it would grant, or should grant to the various intervenors, the Court had come to the decision, rightly or wrongly, that it could not and would not surrender its possession excepting upon certain conditions, which had not been complied with. If for the purpose of this branch of the argument it should be assumed and conceded that up to the time of its decision and in making this decision, all that the Court had done had been without jurisdiction, none the less, the fact remained that certain tangible real property was in the actual custody and control of a *de facto* Receiver, appointed by a Court which unquestionably had general power to appoint such an officer.

Here then we are solidly upon the ground and basis of the decision in Gumbel vs. Pitkin.

The further fact is apparent that during the six or seven years that elapsed from the first taking of possession the condition of the intervening petitioners was changed.

The intervening Treasurer of Ottawa County had the undoubted right to receive the taxes. To the extent of $1,400.00 it seems that these were paid from the net earnings of the road, but to the extent of nearly $600.00 the Treasurer was clearly without relief except through a sale or by the further operation of the road. It is not seriously contended, it is supposed, that the Court should have remained indefinitely in possession running this road until creditors were paid.

As to the intervening petitioners, Arbuckle, Ryan & Company, Barbour & Starr and The Bodifield Belting Company, had they not been permitted to intervene in this case, or assert their rights, those rights were forever lost. They claimed liens under the statutes of Ohio then in force. Such lien, under those statutes, is not perpetual but is subject to the limitation of the Revised Statutes of Ohio, section 3185, which provides that such lien "shall operate as a lien from the date of the first item of the labor performed or the machinery or material furnished upon, or toward, the property designated in the preceding section, and the interest of the owner in the lot or land on which the same may stand, or to which it may be removed, for six years from and after date of the filing of such attested statement. If an action be brought to enforce such lien within that time the same shall continue in force until the final adjudication thereof."

It is clear, therefore, that to have refused to protect the lienors in the final decree would have been to turn them out without any remedy whatsoever in any Court, as their liens were lost by expiration of time. This certainly would hardly be in accord with the expression of the Court in Krippendorf vs. Hyde, 110 U. S., 276, where the Court very justly says, (at page 281) upon this topic:

"If we * * * * take from owners, wrongfully deprived of possession, the ordinary means of redress by suits for restitution in State Courts wherein one may sue without regard to citizenship, it is but *common justice* to furnish them with an equal and adequate remedy in the court itself, which maintains control of the property."

It is stated in the Brief for Appellant that the rights of the lienholders could have been saved by a prompt dismissal of the case and surrender of possession.

This may be conceded, if no duty was owing to the holder of the Receiver's Certificates. It was with this view, that Ar-

buckle, Ryan & Company raised the question that these Certificates were in fact paid by the terms of a contract between their holder and Carrothers, and prayed their surrender and the dismissal of the case. (Record 75.)

Rightly or wrongly the Court below overruled this motion and adjudged the Certificates not to be paid, (Record 76), and thereupon refused the prompt dismissal. Later the Statute of Limitations ran against the lienors' claims.

How, then, can the Federal Court give that equal and adequate remedy required by Krippendorf vs. Hyde otherwise than by exercising the special and limited jurisdiction maintained by Judge Severens in his opinion of January 31st, 1898? (Record 93).

No question can be made as to the power of the State Court to have ordered sale within the time limited by the statute for the payment of the liens of these intervenors. The only remedy, therefore, to be granted by the Circuit Court of the United States that will be adequate would require a similar order. To refuse, therefore, to order such a sale would have caused the lower Court very seriously to trench upon former decisions of the Supreme Court in these three cases of Krippendorf vs. Hyde, Re Tyler, and Gumbel vs. Pitkin, and it is suggested that this Court itself must affirm the decision of the lower Court or reverse its former rulings in the above cases.

The order of the Court decreeing sale may be further sustained upon the intervention of Atlantic Trust Company, the Trustee of the Mortgage Bonds. Its right to intervene is clear. The property was within the hands of the Court, sale was about to be made thereof, and the Company was interested in the proceeds of such sale; and in this instance, necessary diversity of citizenship existed between the Trust Company and the owner of the property and the parties asserting the liens.

The attempt made in Appellant's Brief to discredit the position of the Trust Company and its attorneys is hardly worthy of notice here.

The Trust Company had previously filed an independent Bill in the same Court to foreclose its said mortgage, but upon its becoming clear that sale was to be made in this case it came in as an intervenor and set up its mortgage. An attempt was made by Carrothers through one Simon Baruch to discredit its claim by charging that the Counsel who appeared for it had no right to represent the Company.

This Court, of course, cannot go behind the Record of the lower Court, where it was very properly held that the Court would assume that the Trust Company was represented by Counsel authorized to enter its appearance. (Record 117.)

We cannot, however, overlook the assumption of Counsel in their Brief that the fund finally distributed derived from the sale of the property, did not in any way benefit the Atlantic Trust Company. The holders of these Bonds are today claiming their share of the proceeds now left in the registry of the Court. The amount is, approximately, $2,600.

The property sold for $16,501. The order establishing the liens found that the costs and the Receiver's Certificates were a first lien on all the property. The mechanics' liens of Arbuckle, Ryan & Company, Barbour & Starr and The Bodified Belting Company were established as next in priority, but the lien thereof was confined to the power house and the lots and the lands on which the same stood, to the exclusion of the Railway property, on which latter the mortgage of the Trust Company is a lien next in priority after the costs and Receiver's Certificates. Hence, in the order of distribution, after providing for the payment of costs and Receiver's Certificates the remainder is ordered to be divided; namely, 100-165th to pay mechanics' liens and 65-165ths for the payment of the At-

lantic Trust Company's mortgage. The above proportions upon which this division was made were arrived at from the fact that the value of the power house was fixed by appraisal, made through a Master, at $10,000, and the balance of the Railroad property at $6,500.

The distribution thus made, after taking out costs and Receiver's Certificates leaves in the Registry of the Court applicable to the Atlantic Trust Company's mortgage the sum of $2,576.45. It is made manifest, therefore, that the Trustee for the bond-holders who represented whatever bonds were, in fact, issued and sold for the benefit of the property, as well as the material men who furnished the material to build the power house, who built the engines, boilers and dynamos, all came into this action as intervenors and asked for the foreclosure of their liens, because they were prevented from asserting their liens elsewhere by reason of the possession which the Court maintained of the property. They acquiesced in the just action of the Court in placing ahead of their liens the moneys expended for the betterment and improvement of the property. The right and necessity of these several claims which otherwise they could not enforce was finally recognized by the Court, after much hesitation, and their liens declared and determined. The Court was slow in arriving at this conclusion, because it had repeatedly declared to the owners of the Road "Pay such portion of the Receiver's Certificates now outstanding as represent actual unquestionable expenditure for the preservation and making better of your property and it will be returned to you."

But the Railroad Company (a young man by the name of Carrothers in fact) would not or could not do that, whereupon the Court finally consented to take the lieners' claims into consideration.

The Court will remember that the intervenors were anxious at all times to get out of the dilemma in which they were placed. They tried to have the Court adjudge the Receiver's Certificates paid and to order the Receiver discharged. They attempted to have a hearing in the regular way before a Master on the issues concerning collusion and amount of Complainant's claim. They pressed upon the Court only as a last resort an adjudication of their liens, and not until the same were about to expire by limitation. A failure to have heard their request would have produced most inequitable results.

The entire record makes it clear that the Railway projected by the Appellant Company was built upon credit. Money (a little) raised on bonds, and credit procured of the parties now asserting intervening liens, built and equipped the property. Apparently, not a dollar of the Company's money went into the scheme. Money borrowed upon Receiver's Certificates paid labor liens and tax liens against the property and completed and protected it.

Now the proposition is seriously advanced that a Court of Equity will order the surrender of this property to a nominal owner, for whom the same has been built, equipped, and preserved, and moreover, freed of all possible liens except that of such few of the bonds as may have been negotiated before this action was brought. Unless constrained to such course by the most stringent rules of statutory construction, such Court will not regard the appeal with favor.

To a certain extent Counsel for Appellant seem to recognize the difficulty here suggested and have shown great ingenuity in their discussion (pages 49-50 of their Brief) in suggesting some order that the Court below might have made, and that this Court should perhaps direct to be made to obviate the apparent iniquity of their main demands. Nothing is to be gained by discussion of the various claims made in the Brief

as to conspiracy, collusion and general bad faith of each and every person in this suit, except the innocent Railway Company. In so far, however, as the suggestion made in the Brief touches the question of ordering the Receiver's expenses to be cast upon the Receiver himself, while this Brief is in no sense filed in behalf of the Receiver, yet inasmuch as the jurisdiction we contend for is based, in part, upon the order of the Court in charging these expenses against the property itself, we call attention to certain well settled doctrines. Ordinarily the Receiver is not called upon by a Court to take his chances, either of the litigation itself, or the solvency of either of the parties thereto, but is entitled to protection by an order upon the fund itself. This doctrine is in strict analogy to the common law doctrine that gives every artificer a lien upon the property in his possession to reimburse himself for labor and care expended thereon.

The equitable lien thus created in behalf of the Receiver, unlike the common law lien referred to, is not confined to lien of possession only, but like all equitable liens is so molded by the Court as to protect the officer, effectually, even to the extent, if necessary, of a sale of the property in his charge.

If, in thus protecting its own officer, the Court thereby diminishes the fund rightly belonging to the party successful in the litigation, such party may be reimbursed, if the Court sees fit, by a judgment over against the other party in the suit.

Cutter vs. Pollock, 4 N. Dak., 216.
Heiser vs. Starr, 44 Ill., App., 406.
Hoffersack vs. Hoffersack, 61 How., Pr., 498.
Beckwith vs. Carroll, 56 Ala., 12.
Cattle Co. vs. Bindle, 32 S. W. (Tex.) 582.
Radfield vs. Fulson, 7 N. W. (Ia.) 604.

Such judgment being in the nature of a judgment for costs, is of course, largely within the discretion of the Court, and its failure to render the same cannot defeat the jurisdiction that

the Court had over the property, or that the Court had to make orders concerning the disposition of the property.

Therefore, in opposition to the claim of Appellant, which has been characterized as inequitable, the following claims are submitted as applicable, and decisive of this appeal:

1. The jurisdiction to adjudge the validity, amounts, and priorities of the liens of the several intervenors existed, if the jurisdiction to sell existed; since the power to sell involves the power to decide all questions the decision of which is necessary to give the purchaser a good title.

2. The jurisdiction to sell existed if the enforcement of any of the claims for which sale was made was within the equitable jurisdiction of the lower Court.

3. Such Court had jurisdiction to enforce:—(1) The payment of costs under the Statute of March 3, 1875; (2) The payment of all Receiver's expenses, under said Statute; (3) The payment of all Receiver's Certificates, under the inherent equitable powers of the Court to prevent wrong from the operation of its orders made before discovery of its general lack of jurisdiction; and this, independently of said Statute; and, (4) The payment of all taxes, mechanics' liens, and the Trust Company's mortgage, independently of said Statute or of the inherent equitable powers last mentioned, from the fact of the Court's possession of the property against which the same were asserted, whether such possession was, or was not, originally rightful.

4. The Circuit Court of Appeals, to which the Railroad Company appealed to settle the law of the case, recognized the duty and jurisdiction of the Circuit Court to provide for all proper expenses incurred by the Receiver for the benefit of all concerned in the protection and preservation of the property, and by its mandate enjoined the execution of that duty.

Therefore, the action of the Circuit Court in carrying out that order is not subject to a second appeal.

5. It would be grossly inequitable and unjust to reverse the decrees below and to vacate the sale made to purchasers who relied on the judgment of the Court and the opinions, if not judgment, of the Judges of the Circuit Court of Appeals, as well as the decision of Judges Ricks and Severens sitting as Circuit Judges, that the costs and Receiver's Certificates were established as a final lien on the property.

This case was in the Court below, as the Record shows, for many years, where it received the most careful consideration and where all the questions argued herein were examined many times with great attention and with the most earnest desire to carry out the views of the Circuit Court of Appeals and to follow the decisions of the Supreme Court of the United States. To reverse these decisions, to require the purchasers to lose what they have put in, to turn back to the possession of The Put-in-Bay Water Works, Light & Railway Company, the property, which, when the Receiver took it in charge, was incomplete and of little value, but which, as the result of the Court's action has been made valuable, would in its results, it seems to me, be a serious miscarriage of justice. This Court is trying a case in Equity. Justice and Equity require the decree of the Court below to be affirmed.

Respectfully submitted.

J. K. HAMILTON,

Counsel for Appellees, J. William Ryan and Charles W. Ryan, and Barbour & Starr.